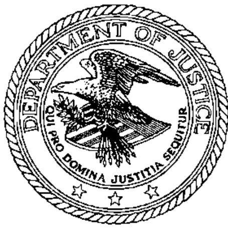

DEPARTMENT OF JUSTICE

Statement

of

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I am pleased to have the opportunity this morning to discuss issues relating to competitive conditions in the agricultural marketplace.

There have been a number of occasions recently in which agricultural producers and others have expressed concerns about competitive conditions in the agricultural marketplace, about the impact on farmers of particular mergers and acquisitions, and about levels of concentration in agricultural industries generally. I can assure you that the Antitrust Division has heard these concerns and takes them very seriously.

We know that the agricultural marketplace is undergoing significant change. We are seeing major advances in technology and productivity, changes in business relationships between producers and packers/processors and, in certain sectors, increasing concentration. In the midst of these changes, the Antitrust Division has a narrow but important role: we enforce the antitrust laws.

The consumer is the primary beneficiary of antitrust enforcement. Competition among producers of goods and services, at all levels in the production process, leads to better quality, more innovation, and lower prices. But proper antitrust enforcement also benefits producers seeking to supply products and services, by enabling them to do so free from anticompetitive interference.

By any measure, the Antitrust Division has been spending a significant

amount of time, energy, and resources on agricultural issues recently. Sometimes these efforts result in enforcement actions, some of which I will describe for you today. In any event, we are very aware of the full range of competitive issues affecting the agricultural marketplace today.

I understand that the Committee is particularly interested in the role that concentration plays in assessing the competitiveness of the agricultural marketplace, and it is to that subject that I wish to turn.

I. The Role of Concentration in Antitrust Analysis

We have heard concerns expressed by various groups about increasing concentration in various agricultural sectors. The antitrust laws do not prohibit all increases in concentration. Increases in concentration may occur through internal growth or through mergers and acquisitions. Internal growth, in particular, is generally thought to be economically beneficial, as it most often reflects the success of producers in the marketplace in attracting and satisfying customers. So, too, mergers and acquisitions and can be economically beneficial, allowing the resulting entities to operate more efficiently, reduce costs, and better meet the demands of the marketplace.

Nevertheless, we often consider concentration in making our enforcement decisions. In the past few years, the Antitrust Division has prosecuted a number of

cases and secured convictions and multi-hundred million dollar fines in industries that are concentrated. Some of the most significant of those cases have involved products purchased by farmers.

For example, beginning in 1996, we prosecuted Archer Daniels Midland and others for participating in an international cartel organized to suppress competition for certain products, including lysine, an important livestock and poultry feed additive. The cartel had inflated the price of this important agricultural input by tens of millions of dollars during the course of the conspiracy. ADM pled guilty and was fined $100 million -- at the time the largest criminal antitrust fine in history. Two Japanese and two Korean firms also were prosecuted for their participation in the worldwide lysine cartel and were assessed multi-million-dollar fines. In addition, three former ADM executives were convicted for their personal roles in the cartel; just recently, two of them were sentenced to serve two years in prison and fined $350,000 apiece for their involvement, and the other executive had 20 months added to a prison sentence he was already serving for another offense.

This spring, we prosecuted the Swiss pharmaceutical giant, F. Hoffmann-La Roche Ltd., and a German firm, BASF Aktiengesellschaft, for their roles in a

decade-long, worldwide conspiracy to fix prices and allocate sales volumes for vitamins used as food and animal feed additives and nutritional supplements. The vitamin conspiracy affected over $5 billion in U.S. commerce. Hoffman-La Roche and BASF pled guilty and were fined $500 million and $225 million, respectively. These are the largest and second largest antitrust fines in history -- in fact, the $500 million fine is the largest criminal fine ever imposed in any Justice Department proceeding under any statute. Two former Hoffmann-La Roche executives from Switzerland also agreed to submit to U.S. jurisdiction, to plead guilty, to serve time in a U.S. prison, and to pay substantial fines for their role in the vitamin cartel. These prosecutions are part of an ongoing investigation of the worldwide vitamin industry, in which there have been 14 prosecutions to date.

We often find that, in order for such conspiratorial activities to succeed, conspirators need a mechanism to police one another -- to make sure that the members are adhering to the agreed-upon scheme -- a prospect that is made much easier if the market is highly concentrated and there are only a few members that need to co-ordinate their conduct. You may have seen the recent article in the New York Times discussing the cases we brought against the vitamin manufacturers, which observed that most international cartels "operate in concentrated markets with few players, making it easy to coordinate pricing."

Of course, concentration levels are important to investigations of unlawful monopolization or attempted monopolization. In such cases, the Antitrust Division must prove that the defendant has monopoly power or a dangerous probability of obtaining such power, and market shares frequently provide a critical reference point in making such a determination.

On a day-to-day basis, however, the most frequent context in which we consider concentration levels involves our analysis of mergers and acquisitions (referred to collectively hereafter as "mergers"). And, to the extent that agricultural producers and others have expressed concerns about levels of concentration in agriculture generally, they generally are referring to changes brought about by such transactions.

II. Merger Enforcement Standards

The principal statutory provision dealing with mergers is Section 7 of the Clayton Act, which prohibits the acquisition of stock or assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Congress realized that, to be effective, merger enforcement should be able to arrest anticompetitive transactions in their incipiency, to forestall the harm that would otherwise ensue but be difficult to

undo. Thus, merger enforcement standards are forward-looking and, while we often consider historic performance in an industry, our primary focus is to determine the likely competitive effects of a proposed merger in the future.

While concentration levels are important to merger analysis -- we look at both pre-merger concentration levels and at concentration levels that will result from the merger -- the ultimate test under Section 7 is whether the merger may tend substantially to lessen competition and, as a law enforcement agency, that is a showing that we must be prepared to make to the satisfaction of a court.

The Antitrust Division generally shares merger enforcement responsibility with the Federal Trade Commission ("FTC"), with the exception of certain industries in which the FTC's jurisdiction is limited by statute. The agencies jointly have developed Horizontal Merger Guidelines that describe the inquiry they will follow in analyzing mergers. "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time." Merger Guidelines § 0.1.

As suggested by the language of Section 7 itself, we seek to define the relevant product markets ("line of commerce") and geographic markets ("section

of the country") in which the parties to a merger compete and then to determine whether the merger would be likely to lessen competition in those markets. The Merger Guidelines set forth the analytical framework we use to define markets. The purpose of this inquiry is to ascertain whether, with respect to a product or service offered by the merging parties, there are alternative products and services to which customers could reasonably turn if it were assumed that the merging parties were the only suppliers of the product or service and sought to increase prices. Once relevant markets are defined, we look at various factors in order to determine whether the merger is likely to have an anticompetitive effect.

In performing this analysis, the Antitrust Division and the FTC consider both the post-merger market concentration and the increase in concentration resulting from the merger. We utilize the Herfindahl-Hirschman Index ("HHI"), which is calculated by summing the squares of the individual market shares of all the participants. We are likely to challenge a transaction that results in a substantial increase in concentration in a market that is already highly concentrated, although appropriate consideration will be given to other factors, such as the likelihood of entry by new competitors, that could affect whether the merger is likely to create or enhance market power or facilitate its exercise.

Of course, it is also possible that a merger will substantially lessen

competition with respect to the purchase of products or services in a relevant market. The Merger Guidelines specifically address this possibility and provide that the same analytical framework will be applied:

> Market power also encompasses the ability of a single buyer (a "monopsonist"), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers. In order to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines.

Merger Guidelines § 0.1.

Additionally, it should be noted that the Antitrust Division has guidelines on non-horizontal mergers that address the circumstances in which a vertical merger -- a transaction between companies at different levels of production -- may be challenged.

III. Procedures for Reviewing Mergers

The Antitrust Division and the FTC use a clearance process to work out which agency will review a particular merger. The primary determinant is agency expertise about the product(s) at issue, so that a merger will usually be reviewed by whichever of the two agencies is most knowledgeable about the relevant product(s).

We take concentration into account even at this very early stage. In determining whether or not to conduct an investigation, we consider the pre-merger concentration level in the affected industry. In those industries already characterized by high concentration levels, there is a substantially increased likelihood that a proposed merger will be subject to a formal -- and often quite extensive -- antitrust review.

The Antitrust Division and the FTC have an array of investigatory tools from which to choose in conducting such an investigation. Parties to most transactions meeting certain size thresholds must provide the agencies with advance notice and observe a waiting period before consummation, during which time the reviewing antitrust agency may obtain relevant information and conduct an investigation. In circumstances in which such notice is not required, the reviewing antitrust agency may utilize other statutory powers to obtain information.

If the reviewing antitrust agency concludes that the merger is not competitively problematic, the investigation will end and the parties are then free to proceed, subject, of course, to review by any other agencies with jurisdiction over the transaction. However, if the reviewing antitrust agency does not resolve its competitive concerns, it is not uncommon for the parties to have substantial

contact with the reviewing antitrust agency. In this way, the agency identifies the nature of its competitive concerns, and the parties have an opportunity to address them. The parties may make a proposal to address the competitive concerns that the reviewing antitrust agency has identified; for example, multi-product firms may have a competitively problematic overlap in a subset of their products, in which case divestiture may solve the problem, allowing the parties to proceed with the overall merger. There are times, however, when the parties' proposed curative relief is not sufficient, in which case the reviewing antitrust agency is likely to seek a preliminary injunction to prevent consummation of the merger pending completion of full judicial or administrative proceedings.

IV. Application of Merger Standards to Agriculture

Section 7 of the Clayton Act applies in the same way to agricultural industries as it does to other industries in general. As a result of the clearance process with the FTC, the Antitrust Division has investigated the preponderance of mergers affecting agriculture, with a prominent exception being grocery store transactions, in which the FTC has substantial experience and expertise.

The Antitrust Division regularly reviews proposed agricultural mergers. As indicated previously, we take concentration levels into account. We are fully aware, for example, that the concentration level in the steer and heifer segment of

the beef packing industry is very high, which makes it very likely that we would take a careful look even at transactions producing only a modest change in concentration. We also note and follow changing concentration levels among other livestock and grain processors, which will impact our merger review in those industries, as well.

Our recent merger enforcement activities in agriculture are perhaps best illustrated by two challenges within the last year to two proposed transactions, one of which sought to protect the interests of farmers as purchasers of corn seed and one of which sought to protect the interests of farmers as sellers of grain and soybeans.

In the biogenetics area, last year the Antitrust Division investigated Monsanto's acquisition of DeKalb Genetics Corporation. Both companies were leaders in corn seed biotechnology and owned patents that gave them control over important technology. We expressed strong concerns about how the merger would affect competition for seed and, to satisfy our concerns, Monsanto spun-off to the University of California at Berkeley its claims to agrobacterium-mediated transformation technology, a recently developed technology used to introduce new traits into corn seed such as insect resistance. Monsanto also entered into binding commitments to license its Holden's corn germplasm to over 150 seed companies

that currently buy it from Monsanto, so that they can use it to create their own corn hybrids.

The Antitrust Division also comprehensively reviewed the proposed purchase by Cargill of Continental's grain business, which resulted in a suit in July to challenge the merger as originally proposed. We were concerned that the proposed transaction would have depressed prices received by farmers for grains and soybeans in certain regions of the country. To resolve our competitive concerns, Cargill and Continental have agreed to divest a number of grain facilities throughout the Midwest and in the West, as well as in the Texas Gulf. The proposed consent decree remains pending before the court, which limits what I can say about the case, but a fair bit about the case is already in the public record from our court filings.

Cargill and Continental operate nationwide distribution networks that annually move millions of tons of grain and soybeans to customers throughout the U.S. and around the world. We looked at all the markets that would be affected by the merger and concluded that, in a number of them, competition would be adversely affected if the assets of the two firms were merged. In this case, our concerns were focused on competition among the two firms in so-called "upstream" markets -- competition for the purchase of grain and soybeans from

farmers and other suppliers. We concluded that the lessening of competition resulting from the merger would likely have led to farmers receiving less money for these crops than absent the merger.

Among the required divestitures, we insisted on divestitures in three different geographic markets where both Cargill and Continental currently operate competing port elevators to preserve the competition that currently exists there: (1) Seattle, where their elevators competed to purchase corn and soybeans from farmers in portions of Minnesota, North Dakota, and South Dakota; (2) Stockton, California, where the elevators competed to purchase wheat and corn from farmers in central California; and (3) Beaumont, Texas, where the elevators competed to purchase soybeans and wheat from farmers in east Texas and western Louisiana.[1]

We also required divestitures of river elevators on the Mississippi River in East Dubuque, Illinois, and Caruthersville, Missouri, and along the Illinois River between Morris and Chicago, where the merger would have otherwise harmed competition for the purchase of grain and soybeans from farmers in those areas.

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[1] In addition to benefitting farmers and other suppliers in the above-mentioned states -- who can be said to be captive to the elevators involved -- the required divestitures may also benefit farmers and other suppliers in Illinois, Iowa, Nebraska, Missouri, Kansas, Oklahoma, Colorado, and New Mexico, who, while not necessarily captive to the elevators involved, nevertheless rely on them as competitive alternatives.

In the case of the Illinois River divestitures and an additional required divestiture of a port elevator in Chicago, the merger would also have anticompetitively concentrated ownership of delivery points that have been authorized by the Chicago Board of Trade for settlement of corn and soybean futures contracts. The delivery points would then have been under the control of Cargill and one other firm, which would have increased the risk that prices for CBOT corn and soybean futures contracts could be manipulated. These required divestitures will address this concern regarding adverse effects on competition in the futures markets.

In addition, we required divestiture of a rail terminal in Troy, Ohio, and we prohibited Cargill from acquiring the rail terminal facility in Salina, Kansas, that had formerly been operated by Continental, and from acquiring the river elevator in Birds Point, Missouri, in which Continental until recently had held a minority interest, in order to protect competition for the purchase of grain and soybeans in those areas.[2]

I have provided information in more detail than usual because I believe it is

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[2] We are also requiring Cargill to enter into what is called a "throughput agreement" to make one-third of the loading capacity at its Havana, Illinois, river elevator available for leasing to an independent grain company, and are imposing restrictions on Cargill in the event it seeks to enter into a throughput agreement with the operator of the Seattle facility.

important for the Committee to understand the thoroughness with which the Antitrust Division reviewed this transaction. With assistance from USDA and CFTC, the Antitrust Division looked at all potentially affected markets and sought relief in those markets in which we concluded that the transaction was competitively problematic.

The Antitrust Division presently is investigating a number of other agricultural mergers that have been proposed. In accordance with statutory and agency confidentiality limitations, I am constrained in my ability to describe them at this stage, except to note that we are looking at each of them carefully and will bring enforcement actions if we believe that they violate the antitrust laws.

V. Conclusion

Mr. Chairman and members of the Committee, the Antitrust Division understands the concerns that have been expressed about changes in concentration in agricultural markets. We take concentration into account in enforcing the antitrust laws. We take seriously our responsibility to assure that the antitrust laws are enforced no less vigorously in agricultural markets than in other markets to which those same laws apply.

I would be happy to respond to whatever questions the Committee may have.